

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CR-CN-0057-2013  
(ARISING FROM TORORO TRAFFIC CASE NO. 0087/2013)**

<b>1. LOKETO MUSA</b>		
<b>2. BARASA ANDREW</b>	<b>:::::::::::::</b>	<b>APPELLANTS</b>
	<b>VERSUS</b>	
<b>UGANDA</b>	<b>:::::::::::::</b>	<b>RESPONDENT</b>

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

The appellants were jointly charged with stealing a motor vehicle c/s 265 and 261 of the Penal Code Act in Chief Magistrate’s Court at Tororo.

Trial Magistrate found them guilty of the offence and convicted and sentenced them each to pay a fine of Ug. Shs. 10,800,000/= or in default to imprisonment of 36 months each. Appellants were dissatisfied and hence this appeal.

In their memorandum of appeal, the appellants raised three grounds of appeal to wit;

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record.
2. The learned trial Magistrate erred in law and fact when she relied on a confession which had been improperly admitted.
3. The sentence imposed was harsh and excessive.

Appellants argued each ground separately as follows:

**Ground 2: The learned trial Magistrate erred in law and fact when she relied on a confession which had been improperly admitted.**

Appellants refer to page 14 and paragraph 2 of the proceedings to show that 2<sup>nd</sup> appellant denied having ever made the said confession statement.

It was the appellant's contention that since the confession was in dispute, the learned trial Magistrate had a duty to carry out a trial within a trial to ascertain its admissibility. The appellants relied on Jackson Kitutu versus Uganda (1976) HCB 8 to argue that the onus is on the prosecution to prove affirmatively that the confession was voluntary, and not obtained by coercion. Also Tuwamoi v. Uganda (1967) E.A.84 which provides that as a matter of practice or prudence the trial court should direct itself that it's dangerous to act upon a statement which has been repudiated in absence of corroboration.

In reply to ground 2, the Resident State Attorney claimed that the learned trial Magistrate did not rely only on the confession statements alone to convict the appellants but also took into consideration evidence of prosecution witnesses and exhibits tendered in court as per page 7 of the record.

As a first appellate court, I have a duty to scrutinize the evidence afresh and reach fresh conclusions thereon as per Pandya v. R (1957) E.A. 336.

According to evidence on record of proceedings, the prosecution called PW.1- **Mohamed Faizan** who stated that A.1 was to bring the stolen vehicle to Kampala in September 2012 but the car didn't reach. He told PW.1 that it was in Jinja in a

garage but didn't tell him in which garage. PW.1 reported to police, and has never got the vehicle.

**PW.2 Inspector DIP Sabitha Abdullah** a police officer. He knew both A.1 and A.2. A.2 brought a vehicle in 2012 for safe custody. He wanted Inspector **Okello**. **Inspector Okello** told the witness to give the vehicle to A.2 on 29<sup>th</sup> October 2012. A.1 and A.2 went to the station and PW.2 communicated with **Okello** and he confirmed that if **Loketo** was there, the vehicle be handed to him. The vehicle was signed for and handed over. The hand over book was exhibited as PID.1 (for identification). When A.2 signed he went away with the vehicle.

Later a one Mohamed went to the station to cross information regarding the released vehicle. As a result **Loketo** (A.1) was arrested and handed over to police at Jinja. Later on **Baraza** was also arrested, **Baraza** recorded a charge and caution statement accepting to have sold the vehicle with **Loketo**. The charge and caution statement was tendered in but counsel objected to its admission on ground that his client said he had been tortured and subjected to duress.

Court however admitted it as Exhibit P.2.

Also a charge and caution statement was extracted from **Loketo**. He also objected to its admission but court admitted the statement.

**DW.1 Andrew Baraza** said he cleared the vehicle but it didn't proceed to Kampala because the driver **Loketo Musa** took it to the police station at Malaba Uganda and parked it for a month.

**DW.2 Loketo Musa** stated that he was to drive the car and hand over to A.1. He parked at Malaba for safe custody and later handed the car to A.1. He doesn't know what later befell the vehicle.

In her judgment the Magistrate on page 4 of the typed judgment noted that;

*“accused persons admitted committing the offence. Accused did not deny signing the charge and caution statement but claimed that they were tortured and threatened that they would rot in jail. Court did not carry out a trial within a trial.”*

To begin with it is trite law that once a confession is retracted, the court must hold a trial within a trial, to ascertain if the confession is voluntary or not. This position was re-emphasized in *Amos Binuge and Others v. Uganda Crim. App. No.23 of 1989* (Supreme Court) held:

*“It's trite law that when the admissibility of extra-judicial statement is challenged the objecting accused must be given a chance to establish by evidence, his grounds of objections through a trial within a trial. The purpose of the trial within a trial is to decide upon the evidence of both sides whether the confession should be admitted. Court cannot by simply looking at the statement, conclude that it was made voluntarily.”*

When pages 4 and 5 of the trial court's judgment is examined it clearly testifies to the fact that court chose to ignore the above procedure, and merely looked at the statements and admitted them.

The Supreme Court in another case of *Kasule v. Uganda Criminal Appeal 10/1987* held that;

*“A trial within a trial should have been held to establish the truth about the confession. Defence counsel was not given a chance either to peruse the statement.*

*Its trite law that a retracted statement/confession or admission will not normally support a conviction unless it is collaborated by other evidence but court might do so if its fully satisfied in the circumstances of the case that the confession must be true....”*

In the judgment, it's clear that the learned trial Magistrate heavily relied on the confession statement to conclude that accused committed the crime. (Page 4) of judgment. The confession though wrongly admitted, still needed corroboration. I do not find sufficient corroboration on record. PW.1 and PW.2 offer no corroboration since PW.1's evidence is hearsay from PW.2 in as far as what transpired at police is concerned.

PW.2 is the same police officer who investigated, arrested and extracted the confessions. He could not corroborate himself.

According to *Kasule v. Uganda (Supra)* it's unsafe to convict on such evidence. Their Lordships held in *Kasule v. Uganda* above thus;

*“Given the unsatisfactory features regarding the way the appellants' confession was admitted in evidence, and in*

*absence of other corroborative evidence, it would be unsafe to uphold the appellant's conviction."*

The burden of proof is on the prosecution. Though the defence case is weak, it does not wash away the prosecution's burden of proof.

Given the arguments raised by appellants under this ground and for reasons I have enumerated above, I find that the learned trial Magistrate erred in law and fact when she relied on a confession which had been improperly admitted. This ground therefore succeeds.

**Ground 1:**

I do not find merit in the arguments by Resident State Attorney on this ground. I agree with appellants that the learned trial Magistrate's assessment of evidence was at most dismissive of the defence case, basically on account of the confession statements- she in essence failed to look at the chain of causation and to place the prosecution case beside the defence case and to weigh the evidence as a whole. It is true that the evidence by defence regarding the role of **Mohamed Opoka** and Monday Robert was never considered by court.

This ground succeeds especially after finding under ground 2 that the confessions were wrongly admitted.

**Ground 3:**

This ground was that sentence was excessive and harsh. The sentence of 36 months for an offence whose maximum sentence is 10 years is not excessive or harsh in my view.

However the alternative sentences of a fine of shs. 10,800,000/= appears-excessive since no formula was given to indicate how it was arrived at.

For the reasons above, I find that learned trial Magistrate committed grave procedural errors in this trial which cannot be allowed to stand once pointed out. They render the conviction incompetent. The appeal therefore succeeds on all grounds. However given the pleadings on record. This court will and hereby quashes the conviction, sentence and orders of the lower court, and substitutes them with an order for retrial before another competent Magistrate.

Accused will be re-admitted on bail until completion of the retrial. I so order.

**Henry I. Kawesa**

**JUDGE**

**17.12.2014**